SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1152

SOUTHERN PACIFIC COMPANY, a Delaware Corporation,
Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; PETER E. MITCHELL, WILLIAM M. BENNETT, A. W. GATOV, WILLIAM SYMONS, JR., and FRED P. MORRISSEY, as members of, and constituting said Commisison; THOMAS C. LYNCH; JOHN J. FERDON; KEITH C. SORENSON; and LOUIS K. BERGNA,
Appellees.

On Appeal from the United States District Court for the Northern District of California

Appellant's Brief in Opposition to Motion to Affirm

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ARGUMENT

I. Substantial Issues are Raised by Appellant's Contentions that Failure of the California Supreme Court to Review the Commission's Record on Factual Issues Relating to Alleged Violations of Procedural Due Process Deprived it of Due Process of Law, and that the District Court Abused its Discretion in Failing to Review the Commission's Record on these Issues.

It is appellant's position that due process required that the California Supreme Court bring up the record before

the Commission in the contempt hearing and independently review it to ascertain the truth of the facts relating to the several charges of deprivation of procedural due process in connection with such hearing made in appellant's application for a writ of review. Appellant also contends that the right of this Court to review such issues on an appeal from the California Supreme Court was an inadequate remedy since the record on appeal would not contain the Commission's record. Accordingly, appellant asserts that the District Court erred in summarily dismissing its complaint, in which it raised these same issues of procedural due process, apparently solely because the court thought the appellate remedy adequate, and that its failure to consider these issues on the Commission's record was an abuse of discretion.

In answer to the first contention, appellee Commission, in its motion to affirm, apparently does not deny that an independent judicial review of the Commission's record was required, but alleges (pp. 6-7) that there was no rule of procedure which precluded appellant from attaching the Commission's record to its petition for a writ of review, and that accordingly it has only itself to blame for any inadequacy of its remedy. Appellee is in error in assuming that the procedure relating to review of orders of the Commission by writ of certiorari (now labeled writ of review) as prescribed by statute contemplated that appellant could attach the Commission's record as an appendix to its application for a writ of review, or that if it did, any consideration would be given to it. Attached, as Appendix A, are the provisions of the Public Utilities Code (sections 1756-1760) relating to writs of review with respect to Commission orders and, as Appendix B, the provisions of the Code of Civil Procedure (sections 1067-1076) relating to writs of

review generally. The latter is also applicable, since section 1758 of the Public Utilities Code states:

> "The provisions of the Code of Civil Procedure relating to writs of review shall, so far as applicable and not in conflict with the provisions of this part, apply to proceedings instituted in the Supreme Court under the provisions of this article."

It is evident under both sets of statutory provisions that the method of procedure is carried out in two steps; first, consideration of the application by the court to determine whether the writ shall issue, which if issued itself requires the Commission or lower court to transmit a certified copy of the record (section 1756, Public Utilities Code and section 1071, Code of Civil Procedure), and then a hearing on the merits on the record as transmitted. Here the California Supreme Court never got beyond the first stage, since it summarily refused the writ, which would have commanded the Commission to certify and transmit its record. It would have been idle for appellant to have attached the record as an uncertified appendix to its application for the writ, since the rule is well settled in California that appellate courts cannot consider provisions of the record, uncertificated, and attached as an appendix to an appellate brief. *Peri v. Culley,* 126 Cal. App. 602, 604 (1932). It is to be noted that California makes a distinction as to whether the uncertified record may be attached to an application for an extraordinary writ between writs of review involved here and writs of mandate used for reviewing orders of other administrative agencies. With respect to the latter section 1094.5 of the Code of Civil Procedure provides:

> "All or part of the record of the proceedings before the inferior tribunal, corporation, board or officer may be filed with the petition, may be filed with respondent's points and authorities, or may be ordered to be filed by the court."

Contrary to appellee's contention, p. 7, we believe the three-judge district court did have jurisdiction to review the Commission's record in connection with the issues of procedural due process. Where issues such as these, which do not require a three-judge court, are joined with an attack on the constitutionality of a state statute, as was the case here in connection with the attack on the delegation of contempt powers to the Commission, a three-judge court may assume jurisdiction. *Florida Lime Growers v. Jacobsen,* 362 U.S. 73 (1960). Assuming that the Court does not agree with us that the delegation of contempt powers to the Commission is unconstitutional, we think we are still constitutionally entitled to a judicial review of the issues of procedural due process in the light of the Commission's record by a lower appellate court. This could be accomplished by remanding the case either to a single judge federal district court or to the California Supreme Court, whose order denying the writ of review is under review by this Court in No. 1050.

Appellee, urges, p. 8, that the alleged bias of Commissioner Bennett was not such as to constitute a violation of procedural due process. It is our position, however, that the merits of our contentions as to violation of procedural due process are not in issue at this stage. In any event this is only one of three such issues raised both before the California Supreme Court and the District Court.

II. Substantial and Novel Issues are Also Raised by Appellant's Contentions that the Granting of Contempt Power to the Commission and the Granting of Criminal Contempt Power to the Commission in Non-petty Cases Without a Jury Trial Violated the Due Process Clause of the Fourteenth Amendment

Appellee's motion in this case, pp. 3-12, adds little with respect to these issues to what was said by appellee in its

motion to dismiss or affirm the appeal in No. 1050. The Court is referred to our brief in opposition (pp. 2-11) in No. 1050, which, we believe, effectively answers in detail all of appellee's contentions and demonstrates that both these issues are substantial and novel.

Essentially appellee still urges that this is a civil rather than a criminal contempt. That, of course, is immaterial on the issue of whether contempt power may be delegated to the Commission at all, under the rule of *Interstate Commerce Commission v. Brimson,* 158 U.S. 447, 485 (1894). While the issue of whether the contempt is civil or criminal is pertinent to the issue of jury trial, we submit that whether a contempt is criminal or civil depends on whether its purpose is remedial (civil) or punitive (criminal). This was the rule enunciated in *Gompers v. Bucks Stove & Range Co.,* 221 U.S. 418, 441 (1911). By that standard the present contempt was clearly criminal. We do not agree with appellee's assertion, p. 11, that whether a contempt is criminal or civil depends on whether the Commission proceeds under the Civil Code or the Penal Code. The one case cited by appellant, *Pacific Tel. & Tel. Co. v. Superior Court,* 265 A.C.A. 985 (1968) does not support this conclusion. There the California District Court of Appeal held (p. 908) that a contempt proceeding brought under the civil code did not require a jury trial under *Bloom v. Illinois,* 391 U.S. 194 (1968) and *Duncan v. Louisiana,* 391 U.S. 145 (1968), because the matter was a "petty offense" within the exceptions in those cases. Since the court would not have found it necessary to consider this exception if it had thought the matter one of civil contempt, it is evident that it did not do so. While the penalty the court was referring to there was, as here, that involved in section 1218 of the Code of Civil Procedure, the court's holding that a petty offense was

involved there is certainly not applicable here. There the court was referring merely to the basic language of the section which permits a fine of $500 or an imprisonment of not exceeding five days. Here, in contrast, the Commission treated each of 44 chargings of fees as separate counts and assessed a fine of $22,000. On this approach, on the same theory, since the same parking fee was assessed by appellant against hundreds of other motorists during this period, the Commission could have with impunity just as well have assessed a tremendous fine and imprisoned officers of appellant for five days for each individual car that a parking fee was collected.

CONCLUSION

Since all of the issues raised by this appeal are clearly novel and substantial the Court should note jurisdiction and set the case for formal argument.

Respectively submitted,

ROBERT L. PIERCE
JOHN MACDONALD SMITH
ROBERT S. BOGASON

Robert L. Pierce

Counsel for Appellant
Southern Pacific
Company

CERTIFICATE OF SERVICE

I, ROBERT L. PIERCE, one of the attorneys for SOUTHERN PACIFIC COMPANY, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify, pursuant to Rule 33(3)(b) of the Revised Rules of the Supreme Court of the United States, that on the 1st day of May, 1969, I served a copy of the foregoing Brief in opposition to motion to affirm as follows:

On all counsel of record for the CALIFORNIA PUBLIC UTILITIES COMMISSION, PETER E. MITCHELL, WILLIAM M. BENNETT, A. W. GATOV, WILLIAM SYMONS, JR., and FRED P. MORRISSEY, as members of, and constituting said Commission, at the offices of the COMMISSION, California State Building, San Francisco, California 94102; THOMAS C. LYNCH, at Fifth Street and Capitol Mall, Sacramento, California; JOHN J. FERDON, at 850 Bryant Street, San Francisco, California; KEITH C. SORENSON, at Hall of Justice and Records, Redwood City, California; and LOUIS P. BERGNA, at 190 W. Hedding, San Jose, California, by mailing a copy, in a duly addressed envelope, first class, postage prepaid, to each such party.

Dated at San Francisco, California, this 1st day of May, 1969.

Robert L. Pierce

65 Market Street
San Francisco, Calif. 94105

Attorney for Southern Pacific Company

(Appendices Follow)

§ 1756. Writ of certiorari

Within 30 days after the application for a rehearing is denied, or, if the application is granted, then within 30 days after the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable *at a time and place then or thereafter specified by court order* and shall direct the commission to certify its record in the case to the court *within the time therein specified.*

§ 1757. Scope of review

No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as provided in this article. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination.

§ 1758. Appearances; judgment; applicability of Code of Civil Procedure

The commission and each party to the action or proceeding before the commission may appear in the review pro-

ceeding. Upon the hearing the Supreme Court shall enter judgment either affirming or setting aside the order or decision of the commission. The provisions of the Code of Civil Procedure relating to writs of review shall, so far as applicable and not in conflict with the provisions of this part, apply to proceedings instituted in the Supreme Court under the provisions of this article.

§ 1759. Jurisdiction

No court of this State, except the Supreme Court to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, except that the writ of mandamus shall lie from the Supreme Court to the commission in all proper cases.

§ 1760. Constitutional questions

In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final.

Appendix B

California Code of Civil Procedure

§ 1067. Writ of certiorari denominated writ of review

The writ of certiorari may be denominated the writ of review.

§ 1068. Courts which may grant writ; circumstances authorizing grant

A writ of review may be granted by any court, except a municipal or justice court, when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy.

§ 1069. Application; notice; order to show cause

The application must be made on the verified petition of the party beneficially interested, and the court may require a notice of the application to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without notice.

§ 1070. Direction of writ; return

THE WRIT TO BE DIRECTED TO THE INFERIOR TRIBUNAL, ETC. The writ may be directed to the inferior tribunal, Board, or officer, or to any other person having the custody of the record or proceedings to be certified. When directed to a tribunal, the Clerk, if there be one, must return the writ with the transcript required.

§ 1071. Contents

CONTENTS OF THE WRIT. The writ of review must command the party to whom it is directed to certify fully to the Court issuing the writ, at a time and place then or there-

after specified by Court order a transcript of the record and proceedings (describing or referring to them with convenient certainty), that the same may be reviewed by the Court; and requiring the party, in the meantime, to desist from further proceedings in the matter to be reviewed.

§ 1072. Stay of proceedings; discretion; effect

PROCEEDINGS IN INFERIOR COURT MAY BE STAYED, OR NOT. If a stay of proceedings be not intended, the words requiring the stay must be omitted from the writ; these words may be inserted or omitted, in the sound discretion of the Court, but if omitted, the power of the inferior Court or officer is not suspended or the proceedings stayed.

§ 1073. Service

SERVICE OF THE WRIT. The writ must be served in the same manner as a summons in civil action, except when otherwise expressly directed by the Court.

§ 1074. Scope of review

THE REVIEW UNDER THE WRIT, EXTENT OF. The review upon this writ cannot be extended further than to determine whether the inferior tribunal, Board, or officer has regularly pursued the authority of such tribunal, Board, or officer.

§ 1075. Perfection of defective return; hearing; judgment

A DEFECTIVE RETURN OF THE WRIT MAY BE PERFECTED. HEARING AND JUDGMENT. If the return of the writ be defective, the Court may order a further return to be made. When a full return has been made, the Court must hear the parties, or such of them as may attend for that purpose, and may thereupon give judgment, either affirming or annulling, or modifying the proceedings below.

§ 1076. Judgment; transmission of copy to inferior tribunal, etc.

COPY OF THE JUDGMENT MUST BE SENT TO THE INFERIOR TRIBUNAL. A copy of the judgment, signed by the Clerk, must be transmitted to the inferior tribunal, Board, or officer having the custody of the record or proceeding certified up.